SUPREME COURT, U. S.
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No. 74-870

In the Supreme Court of the United States

OCTOBER TERM, 1974

GEORGE LAWSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, George Lawson, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, sentencing the petitioner to one year imprisonment upon a jury's verdict of guilty of conspiracy to import cocaine and a substantive count of importation of cocaine.

OPINION BELOW

The opinion of the Court of Appeals is not reported, but is printed in the appendix to this petition (Appendix "A"). The opinion of the Court of Appeals was entered November 26, 1974. A timely Petition for Rehearing was denied by order entered December 19, 1974 (Appendix "C").

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1974 (Appendix "A"). A timely Petition for Rehearing was denied on December 19, 1974 (Appendix "C").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND RULES

18 U.S.C. 3331.

§ 3331. *Summoning and term*

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated, Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of

such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

18 U.S.C. 3332. *Powers and duties.*

• • •

"(b) Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled."

QUESTIONS PRESENTED

1. Is it reversible error in a federal court criminal jury trial for the court to refuse to instruct the jury on the definition of reasonable doubt when requested to do so by the defendant and said refusal is objected to?

2. Is a federal criminal defendant charged with conspiracy to import cocaine and importation of cocaine denied his rights to due process and a fair trial by jury by the trial court's denial of his motion for mistrial after the striking of testimony of a Drug Enforcement Agency agent and a government chemist and denying admission into evidence of approximately 480 grams of a substance identified as cocaine which had been exhibited to the jury for almost one-half of the trial?

3. Was the "special" grand jury which was the third of four such "special grand juries" then in existence in the Northern District of Illinois, illegally impaneled, thus invalidating the indictment?

STATEMENT OF THE CASE

Nature of the Case and Its Disposition

George Lawson was originally indicted in May, 1972, in the Northern District of Illinois, Eastern Division, along with seven others in Indictment No. 72CR398. That indictment charged the defendant, Lawson, with conspiring with the other defendants from April 20, 1971 to the filing of the indictment, to import cocaine into the United States. Lawson was also charged in a substantive count of actual importation in or about the latter part of April, 1971, or the early part of May, 1971. Lawson was not charged in the remaining counts of the indictment.

Lawson, who was continuously a resident of Jamaica during 1971 until his arrest upon his entry into Puerto Rico on October 24, 1972, was arrested upon his entry into Puerto Rico. Lawson, subsequently, attacked the indictment as being duplicitous since the statutes involved were amended on May 1, 1971, changing the penalties involved

and thus, an indictment charging a crime either prior to May 1, or after May 1, 1971, did not adequately apprise the defendant of the nature and cause of the charge against him.

The government in attempting to remedy the indictment, caused Indictment No. 73CR120 to be returned purportedly to supercede the substantive act count of Indictment 72CR398 only, charging that the alleged actual importation took place on or about May 9, 1971. Lawson continued to object to the conspiracy count of 72CR398 as being duplicitous and ultimately, the government caused the "Special September, 1972 Grand Jury" to return the instant Indictment No. 73CR389 which charges the petitioner, Lawson, in Count I with conspiracy to import cocaine into the United States from Jamaica and in Count II with actual importation of cocaine. (R. 1, A. 1) Indictments, 72CR398 and 73CR120 were dismissed as being superceded by 73CR389.

Lawson maintained his plea of "not guilty" and the matter was tried to a jury which returned verdicts of guilty on both counts of the indictment on December 12, 1973 (R56). On February 5, 1974, after denying Lawson's post-trial motions, the Court sentenced Lawson to one year imprisonment on each count, said sentences to run concurrently, the sentence on Count II to be followed by mandatory parole for a period of three years (R64).

Pleadings

Lawson filed numerous pre-trial motions including: Motion To Dismiss The Indictment (R10), Special Motion To Dismiss In The Nature Of A Plea In Bar, For Denial of Speedy Trial Contrary To The Constitution Of The United States And Rule 48, F.R. Cr.P. (R11), Motion For Discovery And For Production Or Inspection Or Copy

under Rule 16, F.R. Cr.P. (R12), Special Motion To Dismiss, etc. (R22), Motion To Dismiss For Lack Of Jurisdiction And Venue (R31). All of these motions were denied except that certain discovery was allowed (R15).

A jury was chosen and the trial began before the jury on December 10, 1973 (R46).

The Trial

The government's case consisted of the testimony of three witnesses—Richard Fox (Tr. 12-54), Lawrence Zaretsky (Tr. 55-98), and Myrna Pierce (Tr. 98-115). Each of these witnesses had originally been codefendants with the petitioner, Lawson, in this case, (originally Indictment 72CR398) and had pled guilty and received probation without any period of incarceration (Tr. 12, 46, 56, 80, 99, 113).

Fox and Zaretsky testified that in May, 1971, they were in Jamaica and while there, met Lawson (Tr. 14, 56-57). Subsequently, in the company of others they saw Lawson in a home at Pimento Cove in Jamaica.

Fox testified that on one of these visits, Lawson stated that he had cocaine for sale and wanted to know if Fox was interested in buying (Tr. 17).

Subsequently, Fox met Lawson and told him he would be interested if he did not have to put up any money and if it could be delivered (Tr. 21). Later the following day, Lawson told Fox the deal was acceptable (Tr. 22).

Fox further testified that before leaving Jamaica he once again stopped at Lawson's residence and there saw Lawson and Myrna Pierce. Fox stated Lawson was packing plastic bags of white powder into a cosmetic case (Tr. 26).

Fox then flew to Chicago. Zaretsky had already left. Zaretsky had flown to Miami, picked up Fox's car and drove it to Chicago (Tr. 62).

Fox and Zaretsky met in Chicago (Tr. 62-63) and went to a bank. Fox went in the bank and brought out an envelope full of money. Then they picked up Myrna Pierce at a hotel and Fox gave Myrna Pierce the money (Tr. 28, 29, 63, 64). However, prior to meeting Myrna Pierce, Fox testified that he went directly to the home of one Susan Shamberg in Chicago when he arrived and that he took out a plastic cosmetic case from the freezer (Tr. 27).

Fox, Zaretsky, DeCarolis, Bennett and Shamberg, apparently, thereafter met at Shamberg's house and mixed the powder in the cosmetic case with lactose (Tr. 66).

Zaretsky also testified over objection to dealing with agent Aurelio regarding sales of cocaine (Tr. 69-77).

Myrna Pierce testified that she knew Lawson and met Fox and Zaretsky at Lawson's residence in Jamaica in May, 1971 (Tr. 100). She further testified that Lawson asked her to take cocaine to Chicago for Fox, that she first declined and then later agreed (Tr. 101). Lawson packed the white powder in a cosmetic case and Fox gave her a number to call in Chicago. She flew to Baltimore and then to Chicago (Tr. 102). In Chicago she called Randy Fine, met her, and gave her the package (Tr. 103).

The following day, Fox and Zaretsky picked her up and Fox gave her an envelope of money (Tr. 104). She then flew back to Jamaica and gave Lawson the envelope. (Tr. 105). Later in June, 1971, she was with Lawson at Pimento Cove in Jamaica and saw Lydia Vasquez and David Bennett. Lawson stated "Rick had sent them down with the balance of the money." (Tr. 105)

The second day of the trial was taken up with the testimony of agent Aurelio and one Mark Cunningham, a government chemist. Aurelio's testimony concerned certain meetings with Zaretsky in Chicago when he purportedly bought packages of white powder which were identified as Government Group Exhibits 1 and 2 (Tr. 116-135). Cunningham's testimony was as an expert and was to the effect that the powder in Exhibits 1 and 2 was cocaine (Tr. 135-152). However, he further admitted that he could not tell whether the two exhibits came from the same source (Tr. 152).

The trial court sustained the objection to the proffered admission of the exhibits (Tr. 175) and thereafter struck the testimony of Aurelio and Cunningham (Tr. 190). However, the Court denied Lawson's motion for mistrial based upon the prejudicial effect of the jury having heard the testimony of Aurelio and Cunningham and having had packages of "cocaine" exhibited to them for the better part of a day (Tr. 190).

The government then rested (Tr. 195). The defendant's motion for judgment of acquittal was denied (Tr. 187). The Court then, at the defendant's request, read a paragraph of the government's bill of particulars that at all times during the alleged conspiracy, Lawson was in Jamaica (Tr. 196).

The defense then rested (Tr. 196) and the government rested in rebuttal (Tr. 196).

The defendant moved for judgment of acquittal at the close of all evidence which was denied (Tr. 218).

Conference was had on instructions wherein the petitioner specifically requested that reasonable doubt be defined to the jury and objected to the Court's declination so to do (Tr. 205-206).

Final arguments were had and the jury instructed.

Pursuant to Rule 30, the petitioner renewed his objections to the instructions as made during the conference and specifically objected to the failure to define reasonable doubt (Tr. 266).

The jury returned verdicts of guilty on both counts (R56).

Following denial of the petitioner's post-trial motions, Lawson was sentenced to one year's imprisonment on each count to be served concurrently with the provision that the sentence on Count II be followed by a mandatory three year parole (R64).

The cause was appealed to the United States Court of Appeals for the Seventh Circuit which affirmed Lawson's conviction by opinion issued November 26, 1974. (App. "A"). A timely Petition for Rehearing was then denied by order dated December 19, 1974. (App. "B")

REASONS FOR GRANTING THE WRIT

In this case the United States Court of Appeals for the Seventh Circuit has now established a rule within the Seventh Circuit which is in conflict with the rulings of the five other Circuit Courts of Appeals which have passed on the issue of refusal to define reasonable doubt to the jury when requested. The Seventh Circuit's opinion is also in conflict with dicta in opinions of this Court. This Court should resolve this conflict.

The issue of the special grand jury has not yet been considered by this court and involves an important federal question which this Court should resolve.

This Court should resolve the apparent conflict between the Seventh Circuit's opinion in this case and prior decisions of this Court and even the Seventh Circuit regarding the rights to due process and a fair trial by jury.

ARGUMENT

I.

IT IS REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON THE DEFINITION OF REASONABLE DOUBT WHEN REQUESTED.

Prior to the conference on instructions the defendant, Lawson, had submitted his requested instruction D (R.66) which included a definition of "reasonable doubt". This instruction was Devitt and Blackmar instruction §11.01 verbatim. The government had also tendered an instruction based on LaBuy instruction 6.01-3 defining reasonable doubt (Tr. 204). The trial judge then, over objection of the defendant and, in fact, the government as well, refused to instruct the jury on the definition of reasonable doubt (Tr. 206). The defendant, pursuant to Rule 30, F.R.Cr.P. again renewed his objection to this refusal to instruct after the giving of the charge and before the jury retired (Tr. 266).

Most circuits have held that:

> ". . . it is the duty of the Court to define and explain the meaning and application of 'reasonable doubt.'"
>
> *Williams* v. *United States* 271 F2d 703, 705 (4 Cir. 1959)

and:

> "In the first place, it was the Court's duty to instruct on the meaning of 'reasonable doubt' . . . and *failure to do so upon request would constitute error.*" (Emphasis added)
>
> *Friedman* v. *United States* 381 F2d 155, 160 (8 Cir., 1967).

Also see: *Holland* v. *United States* 209 F2d 516, 523 (10 Cir. 1954); *Blatt* v. *United States* 60 F2d 481 (3 Cir. 1932); *Nanfito* v. *United States* 20 F2d 376, 378 (8 Cir. 1927); *Schencks* v. *United States* 2 F2d 185 (DC Cir. 1924); *Mundy* v. *United States* 176 F2d 32 (DC Cir. 1949).

Clearly, the trial court's refusal to define reasonable doubt in its charge although requested so to do by the defendant, where defendant preserved his objection pursuant to Rule 30, F.R.Cr.P., constituted reversible error.

The Seventh Circuit has now held in its opinion contrary to what it terms the "federal rule". While the Seventh Circuit purports to recognize the decisions of the other circuits cited above, it chooses to disregard these decisions and even the dicta in this Court's decision in *Holland* v. *United States,* 348 U.S. 121 at 139. It now establishes its own rule regarding the informing of the jury of probably the most important legal concept in a criminal trial.

This Court should review the decision in this case and reverse the Seventh Circuit herein and once again establish uniformity in the federal courts in this most important area.

II.

THE DEFENDANT WAS IRREVOCABLY PREJUDICED BY TESTIMONY OF A DRUG ENFORCEMENT AGENCY AGENT AND A GOVERNMENT CHEMIST AND HAVING A LARGE AMOUNT OF "COCAINE" EXHIBITED BEFORE THE JURY, ALL OF WHICH SAID TESTIMONY AND "COCAINE" WERE INADMISSIBLE AND STRICKEN.

Except for the jury selection process and final arguments and instructions, the actual evidentiary part of the trial in this case lasted less than two days. The opening statements began at 2:00 P.M. on December 10, 1973 (Tr. 2) and both sides had rested by 3:00 P.M. on December 11, 1973 (Tr. 198).

Except for a brief cross-examination of one witness which takes up only six pages of transcript, the entire proceedings on the second day of trial consisted of the testimony of Aldo Aurelio and Mark Cunningham. Aurelio's testimony was simply an attempt to lay a foundation for the admission of Government's Group Exhibits 1 and 2 which were packages of white powder. Aurelio's testimony concerned his purchases of the two exhibits from Zaretsky.

Cunningham was qualified as an expert chemist and testified to his determinations that the exhibits were cocaine, together totalling slightly more than a pound (Tr. 135-152). During all of Aurelio's and Cunningham's testimony, the exhibits purportedly containing more than a pound of cocaine were on the prosecution table in front of the jury or were being exhibited to witnesses in view of the jury.

The trial court, subsequently, agreed that the government had failed to connect Exhibits 1 and 2 with Lawson and sustained the objection to the admission into evidence of the exhibits (Tr. 175). The Court also sustained Lawson's motion to strike the testimony of Aurelio and Cunningham and instructed the jury to disregard it (Tr. 195). However, the Court denied Lawson's motion for mistrial on the basis of the irrevocable prejudice caused by the testimony and exhibiting of the exhibits before the jury (Tr. 190).

The Seventh Circuit has held in *United States* v. *Heft* 413 F2d 1027, 1028, that it was "plain error" not to declare a mistrial where after evidence was admitted, it was then suppressed and the jury directed to disregard it. That opinion relied on the holding in *Bruton* v. *United States* 391 US 123 where at Page 129 it was stated:

> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which as a matter of law, they should not consider but which they cannot put out of their minds . . . the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . ."

The *Bruton* Court held that it could not "accept limiting instructions as an adequate substitute" for Bruton's Sixth Amendment right. This Court should not accept the trial court's limiting instructions as an adequate substitute for Lawson's constitutional right to a fair trial before an unprejudiced jury.

Also see *United States* v. *Kwitek* 433 F2d 18 at 20 (7 Cir. 1970); *United States* v. *Reid* 410 F2d 1223 at 1226 (7 Cir. 1969); *United States* v. *Parks* 411 F2d 1171 at 1172-1173 (1st Cir. 1969). Nothing is more prejudicial to a defendant in the eyes of a jury than a large quantity of a "narcotic drug". It was impossible for the jury to disregard the testimony of Aurelio and Cunningham and the exhibition of Government Exhibits 1 and 2. The trial court's denial of the petitioner's motion for mistrial required reversal.

Clearly, the petitioner was denied due process of law and more particularly the fair trial by a jury which was untainted by the extremely prejudicial testimony of Aurelio and Cunningham and the exhibition of a large quantity of "cocaine" in a case where "cocaine" was the essence of the case.

The Seventh Circuit's artificial distinctions in its opinion in this case of the facts herein and the holdings in other cases such as *Heft, Kwitek,* and *Reid* should not be allowed to stand.

III.

THE SPECIAL SEPTEMBER GRAND JURY WAS ILLEGALLY IMPANELED AND THUS THE INDICTMENT HEREIN WAS INVALID.

The Special September, 1972 Grand Jury which returned the indictment in this case, was the third of four such "Special Grand Juries" then in existence in the Northern District of Illinois. This "Special Grand Jury" had been created pursuant to the provisions of 18 USC 3331 and 3332(b).

While petitioner was aware of the Seventh Circuit's previous decision in *Korman* v. *United States* 486 F2d 926 (7 Cir. 1973) holding that the provisions of 18 USC 3332(b) do not restrict the number of Special Grand Juries to two, he suggested that the decision in the *Korman* case was erroneous and, in fact, not necessary to the decision in that case. It might be pointed out that the "Special Grand Jury" in the *Korman* case was, in fact, the second "Special Grand Jury" to be impaneled in the Northern District of Illinois at the time and thus, clearly permissible by the terms of 18 USC 3332(b). In addition, the *Korman* case was an action brought by a grand jury witness attacking the validity of the grand jury. The United States Supreme Court has held that a witness does not usually have standing to attack the grand jury. (*United States* v. *Calandra* ..... US ..... 38 L.Ed.2d 561, 570).

Clearly, however, a defendant in an indictment does have the right to challenge the grand jury which returned that indictment, and that was done by this petitioner (R. 10) (Rule 6(b) 1 and 2, F.R.Cr. P.).

The Seventh Circuit recognizing this argument nevertheless chooses to follow its prior decision in *Korman*.

The Court is directed to the language of 18 USC 3331 and 3332. It is argued that, clearly, from the provisions of these statutes, no more than two "Special Grand Juries" may be impaneled in any District at one time.

18 USC 3331(a) provides for the authority to the District Court to impanel one special grand jury "unless another special grand jury is then serving".

18 USC 3332(b) provides that "whenever the District Court determines that the volume of business of *the* special grand jury exceeds the capacity of *the* grand jury to discharge its obligations, the District Court may order *an* additional special grand jury for the District to be impaneled." (Emphasis added.)

The definition of "an" is "one", according to dictionaries. (See Black's Law Dictionary, 4th Edition, and Webster's New World Dictionary of the American Language, College Edition, 1966.)

In other words, it is argued that pursuant to 18 USC 3331, the District Court is entitled and, in fact required, to impanel one special grand jury during each 18-month period, but only if no other special grand jury is then serving. Under 18 USC 3332(b), if the Court finds that certain circumstances then exist, the District Court may impanel one additional special grand jury. The Statutes permit only two special grand juries to be impaneled within a District at any one time.

Since the Special September, 1972 Grand Jury was the third special grand jury to be impaneled within the Northern District of Illinois at the same time, then the impaneling of the Special September 1972 Grand Jury was illegal and contrary to Statutes. (This Court may take judicial notice of the fact that the Special September, 1972 Grand

Jury was the third special grand jury to be impaneled at the same time according to the records of the District Court, this Court, and stipulations of the government in the District Court and this Court heretofore.)

It should be pointed out that the Special Grand Juries created under 18 USC 3331 and 3332 are purely statutory creatures designed to serve particular purposes and given additional powers including the powers to file reports and to be extended up to 36 months and longer, and thus, are far different from the Rule 6 (F.R.Cr.P.) Grand Juries which are a derivation from the English grand jury. The law is clear that when a Statute deviates from the common law, particularly penal statutes, it must be strictly construed. (See 50 Am. Jur. §402, *Langetta* v. *New Jersey*, 306 US 451, 59 SCt. 618; *United States* v. *Cardiff* 344 US 174, 97 LEd 200, 73 SCt. 189.)

The Special September, 1972 Grand Jury was impaneled contrary to the authority and provisions of the Statute, was unlawfully impaneled, and thus, its indictment in this case was invalid and must be dismissed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January, 1975

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1134

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE LAWSON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 73 CS 389

Prentice H. Marshall, Judge.

ARGUED JUNE 3, 1974 — DECIDED NOVEMBER 26, 1974

Before CLARK, *Associate Justice* (Retired)*, PELL and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* The defendant George Lawson was convicted by a jury of importing and conspiring to import cocaine into the United States, in violation of 18 U.S.C. § 2, and 21 U.S.C. §§ 952(a) and 963. Lawson

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

raises a number of issues on appeal, including: (1) whether the defendant was prejudiced by a display of cocaine which was not admitted into evidence; (2) whether the indictment was invalid because the Grand Jury which returned the indictment was the third Special Grand Jury in existence at that time in the Northern District of Illinois; (3) whether the evidence was sufficient to prove Lawson guilty beyond a reasonable doubt; (4) whether the district court erred in instructing the jury; (5) whether there was a lack of jurisdiction and venue in the Northern District of Illinois; (6) whether the defendant was prejudiced by certain statements of witnesses and the prosecutor; and (7) whether there was a variance between the evidence and the indictment.

The evidence, taken in the light most favorable to the Government, *Glasser* v. *United States,* 315 U.S. 60, 80 (1942), established the following significant conduct.[1] In April 1971, Richard Fox, Randy Fine, and Larry Zaretsky traveled to Jamaica. While there, they met George Lawson who was living in Jamaica. During a visit to Lawson's home, the defendant stated that he had a supply of cocaine for sale and asked if Fox was interested in purchasing any. After discussing Lawson's offer with Zaretsky and John DeCarolis, Fox told Lawson he was interested in buying the cocaine but that it would have to be delivered to Chicago and payment would not be made until it was delivered. Lawson subsequently informed Fox that the deal was acceptable to

[1] The pattern of confusing and complex movements and interrlations frequently found in narcotics trafficking cases existed in the present case. We have not attempted to set forth a "blow-by-blow" summary.

him and that Lawson's girl friend, Myrna Pierce, would personally deliver the cocaine to Chicago that weekend. In return for the cocaine, Lawson was to receive $4,500 a pound plus a percentage of the profits.

Before leaving Jamaica, Fox again visited Lawson's home, where he saw Lawson packing a white powder into a cosmetic bag. Lawson gave this bag and two clear plastic bags, also containing white powder, to Myrna Pierce and instructed her to take them to Chicago.

Fox then flew to Chicago. Zaretsky flew to Miami, Florida, picked up Fox's car, and drove it to Chicago. Myrna Pierce flew to Chicago by way of Baltimore and, upon arriving in Chicago, she telephoned Randy Fine. Fine, accompanied by another man, picked up the packages from Pierce's hotel room. The following day, Fox and Zaretsky gave Pierce an envelope containing $5,000. Pierce then flew back to Jamaica and gave the envelope to Lawson.

After Pierce had been paid, Fox, Zaretsky, DeCarolis, and David Bennett met at an apartment in Chicago. At that time, the powder from the cosmetic bag was mixed with lactose and placed in one-ounce bottles and one-pound containers.

A few days thereafter, Zaretsky sold a one-ounce bottle of white powder, which he had obtained from Fox, to Special Agent Aldo Aurilio for $1,000. The following day, Zaretsky sold Aurilio another large package for $11,000.

Aprroximately two weeks after these sales to Aurilio, Fox withdrew $10,000 from a bank and gave it to David Bennett with instructions to deliver it to Lawson. Bennett and his girl friend Linda Vasquez then flew to Jamaica. Lawson told Myrna Pierce that "Rick had sent [Bennett and Vasquez] down with the balance of the money."

I

The evidentiary part of Lawson's trial lasted less than two days. During the morning of the second day of the trial, two Government witnesses, Special Agent Aldo Aurilio and Mark Cunningham, a Government chemist, testified. In substance, Aurilio testified that on two separate occasions, Zaretsky sold him packages of white powder which were identified as Government Group Exhibits 1 and 2. Cunningham was qualified as an expert witness and testified that the powder contained in the exhibits was cocaine. During Aurilio's and Cunningham's testimony, the exhibits, purportedly containing more than a pound of cocaine, were on the prosecution's table in front of the jury.

At the conclusion of this testimony, the district court sustained the defendant's objection to the admission of the exhibits on the ground that the Government had failed to connect the exhibits with Lawson. The district judge also struck the testimony of both Aurilio and Cunningham and instructed the jury to disregard that testimony and the exhibits. The court, however, denied Lawson's motion for a mistrial. The defendant contends that the district court erred in denying this motion for a mistrial since Lawson was prejudiced by the testimony of Aurilio and Cunningham and by having the exhibits of cocaine before the jury.

As this court has noted, there are situations in which the display of evidence which is later ruled inadmissible constitutes reversible error. *United States* v. *Heft*, 413 F.2d 1027 (7th Cir. 1969); *United States* v. *Reid*, 410 F.2d 1223 (7th Cir. 1969). However, we have also recognized that not all such displays require reversal. *United States*

v. *Holmes*, 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); *United States* v. *Catalano*, 450 F.2d 985 (7th Cir. 1971), *cert. denied*, 405 U.S. 928 (1972).

In *Catalano*, where the defendants were charged with unlawful possession of property (television sets) stolen in interstate commerce with knowledge that the property was stolen, Government witnesses identified two guns found at or near the scene of a gunfight which had occurred between police and the defendants at the time of the defendants' arrest. The trial court, finding that neither gun had been connected to any of the defendants, refused to admit the guns into evidence and struck all testimony with respect to the guns. The trial court, however, denied the defendants' motion for a mistrial. This court held that the district court's cautionary instruction was adequate to protect the defendants from any possible prejudice and that the court properly denied the motion for a mistrial. In particular, this court noted that the defendants had failed to object to the initial display of the guns to the jury and that, even if a timely objection had been made, the defendants were not prejudiced by the display of the guns since there had been other testimony concerning the fact that a gunfight had taken place.

As in *Catalano*, the defendant in the present case did not object to the initial display of the cocaine.[2] Moreover,

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[2] The defense had a standing objection to all testimony regarding conversations and events outside the presence of the defendant. The defense, however, did not object to the display of the cocaine on the prosecutor's table. The use of standing objections while perhaps facilitating the orderly uninterrupted presentation of testimony is, by its lack of articulation, not designed to point out particular errors to a trial court. Certainly a standing objection should not be given broader scope than is found in its establishing statement.

the testimony of Aurilio was merely cumulative in that Zaretsky had testified about the sales of packages to Aurilio. The defendant did not dispute that these sales had taken place. In addition, the jury had heard extensive and undisputed testimony regarding Lawson's role in initiating the sale to Fox and in directing Myrna Pierce to bring the substance to Chicago. We also note that the district judge admonished the jury during the trial to disregard the exhibits and the testimony of Aurilio and Cunningham. In its final instructions, the court again told the jury to consider only properly admitted evidence in reaching their verdict. See *United States* v. *Catalano, supra; United States* v. *Holmes, supra.* Finally, we note that there is no indication that the Government was acting in bad faith in presenting the testimony of Aurilio and Cunningham or in seeking to have the exhibits admitted into evidence. *United States* v. *Lyon*, 397 F.2d 505, 512 (7th Cir. 1968), *cert. denied*, 393 U.S. 846.

In the context of the entire trial, we conclude that reversible error was avoided by the district court's action in striking the testimony and instructing the jury to disregard both the testimony and the exhibits.[3] *United States* v. *Holmes, supra.*

Our decision is not contrary to this court's opinions in *United States* v. *Heft*, 413 F.2d 1027 (7th Cir. 1969), *United States* v. *Reid*, 410 F.2d 1223 (7th Cir. 1969), and

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[3] The defendant contends that "the prejudice resulting from the exhibition of a large amount of narcotics in a narcotics case is obvious and always incurable." We reject such a *per se* rule which could only be based upon speculation. It could also be argued conversely to the position of the defendant that the jury would be prejudiced against the prosecution for attempting to influence them by showing them drugs which the trial judge said had no place in the case before them.

United States v. *Kwitek*, 433 F.2d 18 (7th Cir. 1970). As we pointed out in *Catalano*, in all three of those cases, the prejudicial evidence was found in the possession of the defendant.

II

The defendant next contends that the indictment against him was invalid because the Special September 1972 Grand Jury, which returned the indictment, was the third such special grand jury then in existence in the Northern District of Illinois.[4] This argument is without merit. As this court has recently noted:

> "The legislative history of the Organized Crime Control Act of 1970 indicates that the Special Grand Jury was created as an instrument to investigate organized crime in areas where such criminal activity was evident. It would thwart the purpose of the Act to limit to two the number of Special Grand Juries in a district when in fact four or five were necessary for adequate investigation of organized crime. *Korman* v. *United States*, 486 F.2d 926, 934 (7th Cir. 1973) (footnote omitted).

Lawson argues that the statement in *Korman* is dicta and further that *Korman* involved an attack by a witness who would have had no standing to attack the grand jury and that, therefore, we should not follow the explicit language quoted above. While it may be, as Lawson contends, that the special grand jury in *Korman* was in fact the second special grand jury impaneled in the district

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[4] 18 U.S.C. § 3332(b) provides:

"Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled."

and therefore clearly permissible by the terms of 18 U.S.C. § 3332(b), and assuming that the defendant here has requisite standing for the attack, we nevertheless, upon reconsideration of the statute, are of the opinion that the subsection of the statute does authorize an additional special grand jury to be impaneled whenever the volume of business is determined by the district court to require it.

We agree with the appellant that ordinarily "an" is to be equated with "one." However, "an" is an article having a generalizing or indefinite force as opposed to the specifying or particularizing effect of "the." *United States* v. *Hudson,* 65 F. 68 (W.D. Ark. 1894). "An" does not have the same connotation of limitation as does "the." *Brooks* v. *Zabka,* 450 P.2d 653, 655 (Colo. 1969).

If the intent had been to limit additional special grand juries to one only, that intent could have been easily and explicitly stated. It was not and we decline to read in the limitation. Such a limitation would have been an artificial one and as stated by Judge Duffy in *Korman* thwarting of "the purpose of the Act."

III

Lawson asserts that the evidence was insufficient to support the jury's verdict on either the substantive count of importing or the count of conspiring to do so.

With respect to the substantive count, the defendant asserts that the Government failed to prove that the substance imported was actually cocaine. When the defendant is charged with a substantive violation of the narcotics laws, the jury, in order to find the defendant guilty, must be convinced beyond a reasonable doubt that the substance imported was in fact a narcotic drug. *United*

States v. *Agueci,* 310 F.2d 817, 828 (2d Cir. 1962). However, it is not necessary that this be proved by direct evidence. "Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished ground for inferring that the material in question was narcotics." *United States* v. *Aqueci, supra* at 828. See also *United States* v. *Atkins,* 473 F.2d 308, 314 (8th Cir. 1973).

In the present case, there was sufficient circumstantial evidence from which the jury could have inferred that the material imported was cocaine. Both Myrna Pierce and Fox testified that the substance which was packed into the cosmetic bag was a white powder. See *United States* v. *Atkins, supra* at 314; *Toliver* v. *United States,* 224 F.2d 742, 745 (9th Cir. 1955). Both Fox and Pierce testified, moreover, that Lawson spoke of selling "cocaine." See *United States* v. *Aqueci, supra* at 829; *Toliver* v. *United States, supra* at 745. The evidence also indicated that Lawson was paid a substantial sum of money in cash by Fox for the white powder. "The fact that a high price has been paid for the substance is also evidence tending to indicate that it was in fact [a narcotic]." *United States* v. *Atkins, supra* at 314. See also *United States* v. *Fiotto,* 454 F.2d 252, 254 (2d Cir. 1972), *cert. denied,* 406 U.S. 918; *Toliver* v. *United States, supra.* Finally, the transaction was carried out in secrecy with the powder being packed into a cosmetic bag for transportation. *United States* v. *Fiotto, supra.*

The evidence was, likewise, sufficient to support the jury's verdict with respect to the conspiracy count. The evidence showed that Lawson agreed to sell cocaine to Fox and to assume responsibility for delivering the substance to Chicago, that Lawson packed white powder into a cosmetic bag and directed Myrna Pierce to take it to Chicago, and that Pierce, upon returning to Jamaica, gave Lawson the money she had received in exchange for the substance. The fact that Lawson might not have been aware of every detail of the plan or every individual involved in the conspiracy is irrelevant since he clearly knew of the conspiracy's essential objective and acted to further it. *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947); *United States* v. *Fellabaum*, 408 F.2d 220, 224 (7th Cir. 1969), *cert. denied*, 396 U.S. 858.

The Government's case against Lawson, after the testimony of Aurilio and Cunningham had been stricken, rested entirely on the testimony of Fox, Zaretsky, and Pierce. Lawson asserts that the testimony of these witnesses should be disregarded since all of these witnesses had, at the time of Lawson's trial, pled guilty and received probation. The jury was aware of the fact that these witnesses had pled guilty to narcotic offenses and that they had received probation. The credibility of these witnesses was a matter for the jury to determine. The testimony of the witnesses in question was not so incredible that the jury could not have relied upon it in reaching its verdict.

IV

The defendant next contends that the district judge committed reversible error by: (1) refusing to instruct the jury on the definition of reasonable doubt, although both the defendant and the Government tendered such an instruction, and (2) incorrectly instructing the jury on the presumption of innocence.

(1)

Prior to final arguments, the court reviewed with counsel the instructions that were to be given and refused. When the tendered instructions on reasonable doubt were reached, attention was first given to the instruction submitted by Lawson, which read as follows:

"The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a 'clean slate'—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

"It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

"The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

'The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. The burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

"A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge. So, if

> the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence. Devitt and Blackmar § 11.01"

The court characterized this instruction, which covers matters other than defining reasonable doubt, as being argumentative which to some extent it is. The judge also stated that it was inaccurate in that he did not believe that the standard of beyond a reasonable doubt encompasses the concept "to a moral certainty." Because of the result we reach we do not need to decide the validity of this ground of rejection. We note that "[s]ome courts define reasonable doubt as requiring persuasion 'to a reasonable or moral certainty.'" 2 Wright, Federal Practice and Procedure § 500, at 342-43. Thus, if the effort is launched at definition, the phrase as stated in the tendered instruction has had judicial approval. However, as illustrative of the difficulties of defining "reasonable doubt" in a manner acceptable to appellate courts, to which problem we will subsequently direct further attention, we note in the case of *United States* v. *Byrd*, 352 F.2d 570, 575 (2d Cir. 1965), the court faulted an alternative definition reading, "It is a doubt to a moral certainty," on the basis that "doubt" and "certainty" are antithetical and the use would tend to create more confusion than light in the minds of the jury. But see, *United States* v. *Acarino*, 408 F.2d 512, 517 (2d Cir. 1969).

As we have noted, the Government also tendered an instruction defining reasonable doubt. In so doing, the Government counsel expressed in colloquy with the court some concern as to whether the failure to give a defining instruction would be error since the defendant had tendered an instruction on the subject. The Government's instruction, which was LaBuy 6.01-3, reads as follows:

> "A reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his life."

The district court declined to give either instruction, stating:

> "The only question before me is whether I should not proceed to define reasonable doubt. I am disinclined to do so. I believe that in a criminal case, we start with the defendant's presumption of innocence, and we proceed to the overcoming of that presumption of innocence beyond a reasonable doubt. I believe that it minimizes beyond a reasonable doubt or dilutes it to undertake to define it, and I do not see that we gain one whit by telling the jury what it isn't."

If the judge had given either of the tendered instructions, each of which came from acceptable authority, we would have no difficulty in saying that the subject had been adequately covered; indeed, we entertain the belief that the result of the jury's decision probably would have been unchanged if either had been given. The court did not do so however, and it is necessary to turn to the question of whether the failure requires a reversal.

What has been referred to as the federal rule is set forth in *Holland* v. *United States*, 209 F.2d 516, 522-23 (10th Cir. 1954), *aff'd.*, 348 U.S. 121, in which Judge Murrah speaking for the court stated:

> "There are many definitions of 'reasonable doubt'. Some courts assert that the words themselves carry their own best definition and that any attempts at clarification or definition tend only to confuse an otherwise simple phrase. See 20 Am.Jur.Evidence, Sec.

1257; 53 Am.Jur.Trial, Sec. 751, 36 Words & Phrases, Reasonable Doubt, pp. 297, 319; Wigmore on Evidence, 3rd Ed., Vol. IX, Sec. 2497. Under the federal rule, however, the accused is entitled to a definition of the term 'reasonable doubt', and failure to instruct upon request has been held to constitute error. *Nanfito* v. *United States,* 8 Cir., 20 F.2d 376; *Blatt* v. *United States,* 3 Cir., 60 F.2d 481; *Egan* v. *United States,* 52 App.D.C. 384, 287 F. 958; *Mundy* v. *United States,* 85 U.S.App.D.C. 120, 176 F.2d 32; *Schencks* v. *United States,* 55 App.D.C. 84, 2 F.2d 185. But, a proper definition of the term does not depend upon the observance of a ritual or the use of precise words found in some accepted definition. *United States* v. *Schireson,* 3 Cir., 116 F.2d 881, 132 A.L.R. 1157; *United States* v. *Stoehr,* D.C., 100 F.Supp. 143, affirmed, 3 Cir., 196 F.2d 276. It is sufficient if the jury is given to understand that reasonable doubt as applied to the measure of its persuasion means a real or substantial doubt generated by the evidence or a lack of it; and that beyond a reasonable doubt means to a reasonable or moral certainty. Wigmore, supra, Sec. 2497."

Holland is dicta as to the particular point here involved for there a defining instruction was given which was found to be acceptable. The dicta status is true of other cases enunciating the rule, e.g., *Friedman* v. *United States,* 381 F.2d 155, 160 (8th Cir. 1967), and *Williams* v. *United States,* 271 F.2d 703, 705 (4th Cir. 1959). However, application of the rule has also been a dispositive matter: *Blatt* v. *United States,* 60 F.2d 481 (3d Cir. 1932); *Nanfito* v. *United States,* 20 F.2d 376, 378 (8th Cir. 1927); *Schencks* v. *United States,* 2 F.2d 185, 187 (D.C. Cir. 1924); *Egan* v. *United States,* 287 F. 958, 967 (D.C. Cir. 1923).

It is also to be noted, however, that in all of these cases except *Blatt* there were other grounds of error.

This court has never ruled on the precise issues presented here.[5] Of greater significance is the fact that the Supreme Court also has not ruled on the precise issue. We are unaware of any court of appeal decision contra to those cited above. Nevertheless, with all due deference to the decisions from other circuits, upon consideration of the issue we are of the opinion that the failure to give a defining instruction of "beyond a reasonable doubt," even though an acceptable instruction has been tendered, should not be the basis for reversing an otherwise fairly conducted trial.[6] We also, of course, are assuming that the jury has been instructed that the prosecution must prove its case

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[5] In *United States* v. *Jonikas*, 197 F.2d 675 (7th Cir. 1952), *cert. denied*, 344 U.S. 877, the defendant, in a collateral attack on the judgment under 28 U.S.C. § 2255, objected, *inter alia*, to the trial court's definition of "reasonable doubt" and contended that "actually the Court gave no definition for reasonable doubt." 197 F.2d at 679. This court held, however, that the inadequacy of the charge did not amount to a denial of due process such as to oust the court of jurisdiction to enter the judgment. *Id.* See also *Kenion* v. *Gill*, 155 F.2d 176, 180 (D.C. Cir. 1946).

[6] The matter of the rule adopted herein for this circuit, i.e., that the failure to give a defining instruction of "beyond a reasonable doubt," even though an acceptable instruction has been tendered, is not the basis for reversal, being apparently contrary to a rule which has been enunciated in several federal cases, the present opinion as to that point has been circulated among all the judges of this court in regular service and no judge has voted that the matter be reheard *en banc*.

beyond a reasonable doubt and that the burden of doing so remains with the prosecution.[7]

We are here dealing with ordinary English words of common acceptance. "I doubt that" is a common expres-

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[7] The district court made it abundantly clear that the proof must persuade beyond a reasonable doubt. Thus:

> "The burden of proving the defendant guilty beyond a reasonable doubt rests on the Government. This burden never shifts throughout the trial.
>
> "The law does not require a defendant to prove his innocence or to produce any evidence. If the Government fails to persuade you that the defendant is guilty beyond a reasonable doubt, then you must acquit him.
>
> * * *
>
> "[Y]ou cannot find the defendant Lawson guilty of conspiracy unless you find beyond a reasonable doubt that he participated in the conspiracy as charged in the indictment with at least one other person.
>
> * * *
>
> "What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed is that the defendant and other persons in some way or manner, through some contrivance, expressly or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.
>
> * * *
>
> "To establish specific intent, the Government must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, purposely intending to violate the law."

In addition to the foregoing examples, the district court in seven other instances relating to the evidence informed the jury of the necessity of proof beyond a reasonable doubt. Whether a jury understands all of the intricasies of complicated instructions, there can be little doubt that these jurors were aware that to convict they had to be persuaded beyond a reasonable doubt.

sion. It is ordinary practice in negligence cases to instruct on the standard of care of a reasonable man. It would not seem to serve much purpose to resort to the antonym and define reasonable doubt as being doubt that was not unreasonable under the evidence. The phrase is not esoteric, such as *res ipsa loquitur*, nor is it confusingly similar to other more common words such as "proximate" or some of those employed in patent law.

Because of the very commonness of the words, the straining for making the clear more clear has the trap of producing complexity and consequent confusion. That this difficulty may be surmounted is evidenced by the attempts which have been approved, although the language of approval has frequently implicitly suggested the difficulties of articulation.[8] That the difficulties may be surmounted, however, does not mean in our opinion that the effort has to be made.

The essential aspect of the matter it appears to us is that the jury clearly understand that there must be proof persuasive beyond a reasonable doubt. Defining the term should be at the option of the trial judge even though a defining instruction is tendered. Lack of definition would not appear to be prejudicial. Thus, although the Fourth Circuit purports to follow the so-called federal rule, *Williams* v. *United States*, *supra* at 705, nevertheless, in the absence of a request or objection, that court was "unwilling to say the failure [to define] when not requested, was error." *United States* v. *Quinn*, 315 F.2d 425, 426 (4th Cir. 1963). Judge Murrah, whose opinion in *Holland*

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[8] Thus, in *Holland*, *supra*, at 523: "While the court's definition of 'reasonable doubt' may not be a model of clarity and conciseness, we think it does suffice to convey the legally acceptable meaning of the term."

has been quoted hereinbefore, recognized that some courts adhered to the view that definition only tended to confuse. Confusion of the jury thinking on this essential aspect of a criminal case, of course, should be avoided. The *Holland* opinion cites, *inter alia,* Words and Phrases. Turning to volume 36 of the Permanent Edition of that work, at 510 *et. seq.,* we find numerous state cases expressing the opinion that there need be no definition. Without further lengthening this opinion by discussing the individual cases cited there, we note statements such as that definition is impossible, that the phrase is self-defining, that there is no equivalent phrase more easily understood, that every attempt to explain renders an explanation of the explanation necessary, that the better practice is not to attempt the definition, and that any effort at further elucidation tends to misleading refinements. That many state courts have so stated is persuasive that the lack of the refining definition does not deprive a defendant of a fair trial. Suggestive that the judicial path has not been an easy one when efforts to define the term have been undertaken is the fact that 36 Words and Phrases, beginning at 483 devotes sixty-one pages to various efforts at explication. Many of these purported definitions do not upon fair analysis say anything more than the simple phrase itself.

For the reasons indicated we find nothing in this record to make us fear that the jury was unaware of the heavy burden of persuasion placed upon the Government. That ultimately is the real purpose of a defining instruction in any event.

However, before leaving this issue we find it is necessary to advert to the manner in which the issue was presented to the court in the present case. Counsel for the defendant

in the instructions conference observed, "My instruction does include a definition of reasonable doubt which I *suggest* should be given." (Emphasis added.) Nowhere in the record do we find that counsel advised the court of the cases cited by the defendant to us on this appeal as stating the federal rule. Counsel did tell the court that the instruction was "Devitt and Blackmar's, which also has been approved by the case law." In looking at that work, however, we find nothing in the annotations of the 1970 edition which would appear to alert the court to the so-called federal rule. On the other hand, one annotation does deal with the "problems of defining 'reasonable doubt.'" 1 Devitt and Blackmar, Federal Jury Practice and Instructions, at 206. One of the cases cited is *Dunbar* v. *United States,* 156 U.S. 185 (1895), in which the court stated at 198-99:

> "Again, error is alleged in the instructions in respect to the matter of reasonable doubt. It is urged that the court failed to instruct the jury as to what constitutes a reasonable doubt, and that in speaking of it it used the term 'strong probabilities.' Repeated attempts have been made by judges to make clear to the minds of the jury what is meant by the words 'reasonable doubt:' but, as said by Mr. Justice Woods, speaking for this court, in *Miles* v. *United States,* 103 U.S. 304, 312, 'attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury.'"

See also, *Holland* v. *United States,* 348 U.S. 121, 140 (1954).

It does not appear to us that reference to the work supporting the tendered instruction would have done other than to enforce the judge's determination not to define. An underlying point here, however, is that we read Rule

30, FED. R. CRIM. P., less narrowly than defendant apparently did. All that was done was to tender the instruction by way of suggestion. After the instructions had been read to the jury, the following occurred: "I reiterate the objections which I made prior to the charge, and during our conference, and without specifying them, if that is agreeable with you, I would ask that those objections be adopted as having been made now, as though I did specify each and every one of them. THE COURT: They may be. MR. WALSH: And I have two specific ones I would like to make, and that is that I object specifically to your including the word, 'until' in the instruction on presumption of innocence, and I specifically object to your declining to instruct on the definition of reasonable doubt." Aside from the propriety of the incorporation by reference, cf. *Hetzel* v. *Jewel Companies*, 457 F.2d 527, 535-36 (7th Cir. 1972), stating that the party specifically objects to the failure to give an instruction which had been tendered does nothing more than go through the motions of complying with the requirement of "stating distinctly the matter to which he objects and the *grounds* of his objection." Rule 30. (Emphasis added.)

In *Tomley* v. *United States*, 250 F.2d 549, 551 (5th Cir. 1957), *cert. denied*, 356 U.S. 928 (1958), the court dealt with a similarly cursory obeisance to the Rule as follows:

> "In his objection, counsel for defendant merely restated his requests, but did not even attempt to give the *grounds* for his complaint that the court below had failed to give the instructions that he had requested. Hence, there was a failure to comply with Rule 30 of the Federal Rules of Criminal Procedure. . . . This being so, and there being no prejudicial error in the court's failure to give the requested charges, appellant may not now complain of their refusal." (Emphasis in original, footnote omitted.)

We agree with the Fifth Circuit that the defendant is not in a position to complain of the failure to give the tendered instruction. Not only the spirit, but the letter of Rule 30 required the statement of grounds.

There was in the present case an additional factor over and above the basic requirement of compliance with the rule in that the trial judge was an Illinois lawyer. His view was in accord with that of the Illinois Supreme Court. "This court has repeatedly held that the legal concept of 'reasonable doubt' needs no definition, and that where an involved instruction on that concept is given it may be deemed prejudicial error." *People* v. *Cagle*, 41 Ill.2d 528, 536, 244 N.E.2d 200, 204 (1969). See also *People* v. *Whittaker*, 45 Ill.2d 491, 496, 259 N.E.2d 787, 789 (1970).

If the federal rule was so drastically different as the defendant now contends, he should have then so contended by, at the very least, bringing to the attention of the court the federal authorities supporting his position.

(2)

With respect to the presumption of innocence, the district court charged the jury:

> "A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the trial *unless and until* he is proved guilty of the crime charged by credible evidence beyond a reasonable doubt." (Emphasis added.)

Lawson argues that the inclusion of the word "until" in the court's instruction constituted error because it created the impression that proof of guilt beyond a reasonable doubt was a certainty.

We find this argument unpersuasive. The jury was instructed that the presumption of innocence remains with

the defendant *unless* and until such time as he is proved guilty by credible evidence beyond a reasonable doubt. In *United States* v. *Shotwell Mfg. Co.*, 287 F.2d 667, 677 (7th Cir. 1961), *aff'd*, 371 U.S. 341 (1963), and *United States* v. *Senior*, 274 F.2d 613, 616 (7th Cir. 1960), this court reviewed instructions similar to the one given in the present case and held that there was no error if, considering the instructions as a whole, the jury was instructed that the burden of proof never shifts to the defendant and that all the evidence should be considered by them in reaching a verdict. In the present case, when we consider the instructions as a whole, we are convinced that the jury was adequately charged on these matters.[9] *Compton* v. *United States*, 305 F.2d 119, 121 (9th Cir. 1962).

V

Lawson further asserts that because he was a resident of Jamaica at all times during the alleged conspiracy

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[9] The court charged, *inter alia*:

"The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you, after weighing *all of the evidence*, must be convinced of the defendant's guilt beyond a reasonable doubt before you can find him guilty.

* * *

"The burden of proving the defendant guilty beyond a reasonable doubt rests on the Government. This burden never shifts through the trial.

"The law does not require a defendant to prove his innocence or to produce any evidence. If the Government fails to persuade you that the defendant is guilty beyond a reasonable doubt, then you must acquit him.

* * *

"You will, of course, first ascertain whether or not the substance in question is in fact cocaine as alleged, and in doing so you will consider *all the evidence* in the case which may aid in the determination of that issue." (Emphasis added.)

and importation, the district court lacked jurisdiction over him. The evidence established, however, that Lawson was a member of the conspiracy; that the object of the conspiracy was to violate the narcotics laws of the United States; that the conspiracy was carried on partly in and partly out of the United States; and that overt acts were committed within the United States. It is well established that, in such a situation, the federal district court has jurisdiction to try the defendant for conspiracy even though he was corporeally outside the United States at all times during the alleged conspiracy. *Ford* v. *United States,* 273 U.S. 593, 620 (1927); *United States* v. *Correa-Negron,* 462 F.2d 613, 614 (9th Cir. 1972); *Rivard* v. *United States,* 375 F.2d 882, 886 (5th Cir. 1967), *cert. denied,* 389 U.S. 884. Moreover, as the Fifth Circuit pointed out in *Rivard, supra,* where, as here, the substantive offense is committed within the United States, the district court also has jurisdiction over the defendant, as a principal,[10] with regard to the substantive offense, even though the defendant's participation took place outside the United States.

Lawson further maintains that even if jurisdiction existed, venue did not properly lie in the Northern District of Illinois since he first entered the United States and was arrested in Puerto Rico. This contention is frivolous. Venue was properly laid in the Northern District of Illinois where the offenses were "continued or completed." 18 U.S.C. § 3237(a). *Rivard* v. *United States, supra* at 888. It has long been recognized that, in conspiracy cases, venue is proper, under § 3237, in the district where the conspiracy was formed or in any district in

[10] Lawson's acts of counselling, aiding and abetting Fox, Zaretsky, and Pierce in the importing of cocaine make Lawson responsible as a principal under 18 U.S.C. § 2.

which any overt act in furtherance of the conspiracy was committed, even though the defendant has never been present in that district. *Downing* v. *United States*, 348 F.2d 594, 598 (5th Cir. 1965), *cert. denied*, 382 U.S. 901.

VI

In answering questions on direct examination, Fox and Zaretsky on several occasions referred to substances as "cocaine."[11] Additionally, at one point during the trial, the prosecutor referred to the substance being discussed as "cocaine." The defendant contends that the district court erred in denying his motions for a mistrial based on these references to "cocaine."

We note, however, that each time Fox or Zaretsky referred to the substance as "cocaine," the district court sustained the defendant's objection. Similarly, on the one occasion that the prosecutor referred to the substance as "cocaine," the trial judge sustained an objection from the defense. Moreover, in almost every instance, the court ordered the statement stricken from the record and instructed the jury to disregard it. In his final charge to the jury, the district judge again instructed the jury that "[t]estimony and exhibits to which I have sustained an objection, or which I have ordered stricken from the record do not constitute evidence and you must not consider it." We also note that there is no indication that the prosecutor solicited the use of the word "cocaine" by Fox or Zaretsky. The prosecutor's own single reference to "cocaine," likewise, appears to have been inadvertent rather than deliberate. Under these circumstances, the district court's denial of Lawson's motions for a mistrial

[11] This, of course, is to be differentiated from the testimony that Lawson, himself, referred to the substance as "cocaine," which was properly in evidence as an admission of a party.

was not erroneous. See *United States* v. *Kidd*, 446 F.2d 1385, 1386 (5th Cir. 1971); *United States* v. *Jiminez-Badilla*, 434 F.2d 170, 174 (9th Cir. 1970); *United States* v. *Schwartz*, 398 F.2d 464, 470 (7th Cir. 1968), *cert. denied*, 393 U.S. 1062 (1969).

VII

Finally, Lawson contends that, with respect to the substantive count, there was a variance between the indictment and the evidence. The indictment for this count charged that the defendant and others did "in the Northern District of Illinois, Eastern Division, and elsewhere . . . import and cause to be imported . . . cocaine . . . into the United States from Jamaica. . . ." The evidence was in variance with this, according to Lawson, since it indicated that (1) Lawson was in Jamaica at all times in question, and (2) Myrna Pierce flew with the substance to Baltimore from Jamaica and then from Baltimore to Chicago. Any importation, the defendant concludes was to Baltimore, not to the Northern District of Illinois. This argument is frivolous. The indictment charges that the offense occurred in "the Northern District of Illinois, Eastern Division, *and elsewhere.*" (Emphasis added.) Moreover, even assuming a variance existed, the defendant has wholly failed to show its materiality. *United States* v. *Morado*, 454 F.2d 167, 170 (5th Cir. 1972), *cert. denied*, 406 U.S. 917. Finally, the fact that Lawson resided in Jamaica during the time of the importation is irrelevant. Lawson instructed Pierce to transport the cocaine to the United States and was, therefore, liable as a principal. 18 U.S.C. § 2.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

—Opinion by Judge Pell—

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 26, 1974

Before

Hon. Tom C. Clark, Associate Justice*
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1134 vs.

GEORGE LAWSON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this court filed this day.

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CICRUIT
Chicago, Illinois 60604

December 19, 1974.

Before
Hon. Tom C. Clark, Associate Justice*
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1134 vs.

GEORGE LAWSON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Prentice H. Marshall, Judge — No. 73 CR 389

On consideration of the petition of defendant-appellant, George Lawson, for a rehearing by the court in the above-entitled appeal, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the defendant-appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

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* Justice Clark is sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-870

GEORGE LAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the trial court erred in not defining "reasonable doubt," (2) that the jury was prejudiced by exposure to evidence later ruled inadmissible, and (3) that the grand jury that indicted him was improperly convened.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of unlawfully importing a controlled substance (cocaine) and of conspiring to commit that offense (21 U.S.C. 952a; 18 U.S.C. 2, 371). He was sentenced to concurrent one year prison terms. The court of appeals affirmed (Pet. App. A).

1. The evidence disclosed a venture involving petitioner, Richard Fox, Randy Fine, Larry Zaretsky, David Bennett, John DeCarolis, and Myrna Pierce, among others,

through which cocaine was smuggled into the country. Fox, Zaretsky, and Pierce all testified as government witnesses.[1]

Fox, accompanied by Fine, Zaretsky, and DeCarolis, visited Jamaica in April 1971. While there, Fox met petitioner, who asked if Fox would be interested in purchasing some cocaine. Fox later discussed this offer with Zaretsky and DeCarolis, who revealed knowledge of potential purchasers of the cocaine (Tr. 14-20). Fox then told petitioner that he was interested in making a purchase, but only if petitioner would have the cocaine delivered to Chicago and agree to be paid after its arrival. Petitioner agreed, and indicated that his girl friend, Pierce, would carry the drug to Chicago. Shortly before leaving Jamaica, Fox visited petitioner at his house and observed him packing a white powdery substance into a cosmetic case, which petitioner gave to Pierce along with two other plastic bags containing more of the powdery substance (Tr. 21-24, 102-103).

When Pierce arrived in Chicago, Fine came to her hotel and got the packages (Tr. 103). Later that day, Fox met Fine and Bennett at Susan Shamberg's apartment, where he saw the cosmetic case in the freezer. The next day Fox and Zaretsky took $5,000 in cash to Pierce (Tr. 27-28).[2] Fox and Zaretsky then returned to the Shamberg apartment, where they observed DeCarolis take the powder from the cosmetic case, mix it with lactose, and divide it into one ounce bottles (Tr. 29-32).

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[1]Bennett, Fine, Fox, and Zaretsky were also indicted on drug charges and pleaded guilty.

[2]Bennett later flew to Jamaica at the behest of Fox and Zaretsky and delivered another $10,000 to petitioner.

A few days later, Zaretsky told Fox to give him an ounce of cocaine, stating that he had secured a potential buyer. Fox testified that he then went to his father's building, obtained a one ounce bottle, and gave it to Zaretsky (Tr. 33-34). Zaretsky testified that he sold it to an individual later identified as Special Agent Aldo Aurilio for $1,000. Zaretsky also stated that he later sold a larger package of cocaine to Agent Aurilio for $11,000 (Tr. 72-75).

During the trial, Agent Aurilio corroborated Zaretsky's testimony that he had made two purchases from him. The packages were introduced as government exhibits, and a chemist testified that they contained cocaine. The trial court, however, sustained an objection to the admission of these two exhibits and also struck the testimony of Aurilio and the chemist on the grounds that the government had not established that the substance that petitioner had allegedly caused to be imported was the same substance that Zaretsky later sold to Aurilio (Tr. 154-195). The court declined to declare a mistrial; instead, it admonished the jury to disregard the testimony and proposed exhibits (Tr. 195).

2. Petitioner first argues that the district court erred in declining to define the term "reasonable doubt." The position of the district court in this regard was that

> * * * in a criminal case, we start with the defendant's presumption of innocence, and we proceed to the overcoming of that presumption of innocence beyond a reasonable doubt. I believe that it minimizes beyond a reasonable doubt or dilutes it to undertake to define it. ([Pet. App. A, A13.])

Accordingly, the court in its instructions to the jury, while not defining reasonable doubt, emphasized that in a criminal case the defendant is presumed innocent and that the burden of proving the defendant guilty beyond a

reasonable doubt rests always with the government.[3] The court of appeals also determined that providing a definition of the basic term "reasonable doubt" could add little to the jury's understanding. "Because of the very commonness of the words, the straining for making the clear more clear has the trap of producing complexity and consequent confusion" (Pet. App. A, A17). This, it seems to us, is correct. And while this Court has not directly ruled on the issue, it has stated in dicta that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Miles* v. *United States*, 103 U.S. 304, 312. See also *Holland* v. *United States*, 348 U.S. 121, 141; *Dunbar* v. *United States*, 156 U.S. 185, 199.

Nor is review by the Court warranted because of a difference among the lower courts, for, in fact, no "active" conflict exists. As the decision below noted, the more recent statements of courts of appeals suggesting that a definition must be provided have themselves been dicta for in each of those cases, for the trial courts involved did attempt to explain the term. *Friedman* v.

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[3]The court instructed (Tr. 251):

> The burden of proving the defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial.
>
> * * * * *
>
> A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the trial unless and until he is proved guilty of the crime charged by credible evidence beyond a reasonable doubt.

Petitioner had submitted a long instruction which, among other things, required proof to a "moral certainty." The district court properly found the instruction inaccurate and argumentative. Pet. App. A, A11-A12. The district court also declined to give a prosecution instruction on reasonable doubt. *Id.* at A12-A13.

United States, 381 F.2d 155, 160 (C.A. 8); *Williams* v. *United States*, 271 F.2d 703, 705 (C.A. 4).[4] *United States* v. *Pepe*, 501 F.2d 1142, 1143 (C.A. 10); see also *Holland* v. *United States*, 209 F.2d 516, 522-523 (C.A. 10). Only in a few older decisions, whose precedental value on this question is doubtful, have reversals been ordered for failure to provide a definition. See *Blatt* v. *United States*, 60 F.2d 481 (C.A. 3); *Nanfito* v. *United States*, 20 F.2d 376 (C.A. 8); *Schencks* v. *United States*, 2 F.2d 185 (C.A. D.C.).[5] There thus is no present conflict between the circuits and, in any event, this question of judicial technique is not one that demands uniformity.

3. Petitioner next argues that the trial court erred in failing to declare a mistrial after striking the testimony of Aurilio and the chemist and declining to admit the two government exhibits. This contention was fully considered and rejected by the court of appeals (Pet. App. A, A4-A7) which pointed out (*id.* at A5-A6):

> Moreover, the testimony of Aurilio was merely cumulative in that Zaretsky had testified about the sales of packages to Aurilio. The defendant did not dispute that these sales had taken place. In addition, the jury had heard extensive and undisputed testimony regarding Lawson's role in initiating the sale to Fox

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[4]In a subsequent case, the Fourth Circuit determined that, in the absence of a timely objection, the failure to define "reasonable doubt" did not constitute "plain error" under Rule 52, Fed. R. Crim. P. See *United States* v. *Quinn*, 315 F.2d 425 (C.A. 4).

[5]Recent opinions of state courts reflect a majority supporting the trial court's position that a definition of the term is not required. See *People* v. *Robinson*, 21 Ill. App. 3d 343, 315 N.E. 2d 95 (1974); *State* v. *Wirsen*, 214 Kans. 525, 520 P.2d 1204 (1974); *Orrill* v. *State*, 5[illegible] 2d 930 (Okl.) 1973 Ct. of Crim. App.,; *Bentley* v. *State*, [illegible].2d 203 (Wyo. Sup. Ct., 1972); *State* v. *Taylor*, 128 Ga[illegible], 170 S.E. 2d 281 (1969); Contra: *State* v. *Holm*, 93 Id[illegible] 478 P.2d 284 (1970); *Commonwealth* v. *Young*, 317 A[illegible] Pa. Sup. Ct., 1974).

> and in directing Myrna Pierce to bring the substance to Chicago. We also note that the district judge admonished the jury during the trial to disregard the exhibits and the testimony of Aurilio and Cunningham. In its final instructions, the court again told the jury to consider only properly admitted evidence in reaching their verdict. [Citation omitted.] Finally, we note that there is no indication that the Government was acting in bad faith in presenting the testimony of Aurilio and Cunningham or in seeking to have the exhibits admitted into evidence. [Citation omitted.]

In our view, this evidence, fully subject to cross-examination, should have been admitted for the jury's consideration as corroboration of the testimony of the various witnesses (see Pet. App. A, A9). But having succeeded in excluding it, the defendant received all the benefit he was due. And, as the court pointed out (*ibid.*) there was sufficient other evidence to sustain the jury's verdict.[6]

4. The indictment charging petitioner was returned by the third of four Special Grand Juries in the Northern District of Illinois. Petitioner argues that the indictment was void because the enabling provision of the Organized

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[6] *Bruton* v. *United States*, 391 U.S. 123, cited by petitioner, is readily distinguishable. There, a confession implicating the defendant by a co-defendant who did not testify, was introduced at trial as evidence against the co-defendant. This admission was held reversible error, even though the jury had been instructed to ignore the confession insofar as it implicated the defendant. In reversing, this Court noted that the evidence in question "added substantial, perhaps even critical, weight to the Government's case" (*id.* at 128), and that the defendant who made the confession did not testify. In petitioner's case, however, the testimony ultimately struck was subject to cross-examination and had previously been corroborated by the testimony of petitioner's co-conspirators.

Crime Control Act of 1970 authorizing such Special Grand Juries (Pub.L. 91-452, Title I, §101(a), 84 Stat. 923, 924) permits no more than two special grand juries per district. Petitioner finds this limitation in the language of 18 U.S.C. 3332(b), which provides:

> Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

Such a restrictive reading of the statute is unwarranted, and as the court below noted, it would serve only to "thwart the purpose of the Act to limit to two the number of Special Grand Juries in a district when in fact four or five were necessary for adequate investigation of organized crime" (Pet. App. A, A7, quoting *Korman* v. *United States*, 486 F.2d 926, 934 (C.A. 7)). Moreover, the specific legislative history of the Organized Crime Control Act of 1970 shows that "[t]he purpose of these provisions is to make available *a sufficient number of grand juries* in each judicial district to accommodate the general needs of the district and the special needs of the typically lengthy organized crime case." H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 39 (emphasis added).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

DOJ-1975-03